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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ONTWONE MICHAEL SPENCER,

Defendant and Appellant.

H034801

(Santa Clara County

Super.Ct.No. CC807454)

Defendant Ontwone Michael Spencer appeals from a stipulated order finding that his competence had not been restored and transferring him back to Atascadero State Hospital. The order came after a contrary recommendation from the State Hospital for a finding that his competence had been restored following a previous order that had judged him incompetent under Penal Code section 1367 et seq.<sup>1</sup> We affirm.

STATEMENT OF THE CASE

I. *Facts of the Crime*<sup>2</sup>

On May 30, 2008, defendant walked inside a Wienerschnitzel restaurant in Santa Clara. A female employee was at the drive-through window. Defendant came up behind

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<sup>1</sup> Further statutory references are to the Penal Code.

<sup>2</sup> We take the facts of the crime as relayed in psychological reports contained in the record.

her. As he stuck an object in her back, he grabbed a bag of money that was on the counter next to her and fled on foot. The bag held \$2,000 of the prior day's receipts. The employee did not see defendant's face. Other witnesses reported seeing defendant flee from the restaurant with the money from the bag. He was later seen loitering at a nearby video arcade. Police arrested him in that vicinity.

## II. *Procedural Background*

After waiving a preliminary examination, defendant was charged by information with one count of second degree robbery in violation of sections 211/212.5, subdivision (c). The information further alleged that he had suffered a prior serious felony conviction within the meaning of sections 667, subdivision (a)(1) and 1192.7 (robbery), a prior strike within the meaning of sections 667, subdivisions (b) through (i) and 1170.12 (robbery), and four prior convictions within the meaning of section 667.5, subdivision (b) (robbery, grand theft, "transportation, sales, controlled substance," and battery on a peace officer).

Although he initially had counsel, defendant at one point began to represent himself. On March 18, 2009, the court terminated his self-representation and declared a doubt as to his competency. He was declared incompetent at a hearing on May 6, 2009, and criminal proceedings were suspended. On May 27, 2009, over his assertions of competency, defendant was ordered committed to Atascadero State Hospital for a maximum term of three years under section 1370, subdivision (a)(2).

In July 2009, medical personnel at the State Hospital reported that defendant had been prescribed new medication. They recommended that this medication be continued and that he be found competent to stand trial and returned to custody.

When defendant returned to the Santa Clara County Jail, he was not provided with his medication, as a result of which, at a July 22 hearing, he said he had "kind of deteriorate[ed]." At the hearing, defendant's counsel stipulated that his competency had not been restored and, over his objection, that he be ordered back to the State Hospital

“for further proceedings under [section] 1370, and to be returned” once competency was restored.

Representing himself, defendant filed a petition for writ of habeas corpus in the trial court challenging the basis for his return to the State Hospital and contending that he was provided with ineffective assistance of counsel for his attorney having stipulated to his lack of competency. The trial court denied the petition by order filed September 8, 2009, for defendant’s failure to have shown a prima facie case for relief.

On September 24, 2009, defendant filed a second petition for habeas corpus alleging that his return to the State Hospital was not supported by a medical opinion as to his competency.

On October 2, 2009, defendant, representing himself, filed what he entitled “Belated Notice of Appeal” from the court’s “incompetency order dated 8-28-09.”<sup>3</sup> The notice was dated September 17, 2009 and it was accompanied by defendant’s declaration stating that his counsel had refused his August 28, 2009 directive to file a notice of appeal from the court’s order returning him to Atascadero State Hospital.

On October 7, 2009, the court found that defendant’s competence had been restored and criminal proceedings resumed.

On October 13, 2009, defendant filed a second notice of appeal challenging as “unconstitutional” the same order as referenced in the prior notice of appeal. In the space for requesting a certificate of probable cause, the second notice stated that the court “acted in excess of its jurisdiction” and “conspired with the [public] defender[’]s office and the district attorney[’]s office” when it ordered defendant “commit[t]ed to a state

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<sup>3</sup> We assume the notice was referring to the court’s order made at the July 22, 2009 hearing as there is no later order in the record and there is certainly not one dated August 28, 2009.

hospital based on their personal unprofessional opinions,” denying defendant his “due process right to be evaluated by an expert.”

## DISCUSSION

We appointed counsel to represent defendant in this court. Appointed counsel filed an opening brief that stated the case and the facts but raised no specific issues and requested this court to conduct an independent review under *People v. Wende* (1979) 25 Cal.3d 436. We notified defendant of his right to submit written argument on her own behalf within 30 days. This period has elapsed and we have received no written argument from defendant.

We have reviewed the entire record under *Wende* and *People v. Kelly* (2006) 40 Cal.4th 106. Based upon this review, we have concluded that there is no arguable issue on appeal. We do note the three issues stated in defendant’s brief, provided under *Anders v. California* (1967) 386 U.S. 738, 744-745 “to assist the court in conducting its independent review of the record.”<sup>4</sup> Based on our review, we conclude that these issues are not arguable on appeal.

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<sup>4</sup> The stated issues are:

1. “The court lacked the statutory authority or [defendant] was deprived of due process when the court found on July 22, 2009<sub>[,]</sub> that his competence was not restored and issued an order returning him to Atascadero State Hospital. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 15; Pen. Code, § 1372.)”

2. “[Defendant] received ineffective assistance of counsel when trial counsel stipulated to finding his competence not restored instead of objecting to the finding and order recommitting him to [Atascadero State Hospital]. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 687.)”

3. “The delay in the criminal proceeding from not finding [defendant’s] competency was restored in July 2009 required dismissal of the criminal case. (U.S. Const., 14th Amend.; Cal. Const., arts. I, § 15; *Barker v. Wingo* (1972) 407 U.S. 514.)”

DISPOSITION

The judgment is affirmed.

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Duffy, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Mihara, J.